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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-79.

RELIANCE ELECTRIC COMPANY,
Petitioner,

v.

EMERSON ELECTRIC COMPANY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

MEMORANDUM IN OPPOSITION TO MOTION OF GULF & WESTERN INDUSTRIES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

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ARGUMENT.

I.

The motion of Gulf & Western Industries, Inc. for leave to file a brief *amicus curiae,* and the accompanying brief, are directed entirely toward the question whether the purchase by which a person becomes a 10% beneficial owner may be included as a transaction in determining Section 16(b) liability. This question is not before the Court.

1. The above question was presented to the Eighth Circuit in this case, and was resolved favorably to peti-

tioner Reliance. Respondent Emerson did not cross-petition for certiorari, and thus the portion of the decree below which was decided adversely to Emerson is not before this Court. *Alaska Industrial Bd. v. Chugach Electric Ass'n*, 356 U.S. 320 (1958); *LeTulle v. Scofield*, 308 U.S. 415 (1940).

2. The question of law involved in Emerson's purchase of shares, which is the only question to which the Gulf & Western *amicus* brief is directed, was not set forth in the "Question Presented" in the Petition for a Writ of Certiorari, nor is it a subsidiary question fairly comprised therein. Supreme Court Rule 23(1)(c) provides that: "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." Supreme Court Rule 40(1)(d)(2) provides that the brief of petitioner may not raise additional questions or change the substance of the questions already presented; and Supreme Court Rule 42(5) strongly implies that a brief *amicus curiae* is subject to the same restriction.

3. Neither of the parties to the case has argued the question whether Section 16(b) applies to the purchase by which a person becomes a 10% beneficial owner.

II.

Although petitioner believes, for the foregoing reasons, that a response on the merits to the argument made in Gulf & Western's brief *amicus curiae* is neither required nor appropriate, petitioner notes the following:

1. The key to the argument from legislative history in Section 1 of the *amicus* brief is the assertion that Senate Bill No. 3420, introduced on April 27, 1934, did not contain the exemption clause applicable to 10% beneficial owners, and did not contain the preamble presently found

in Section 16(b). This assertion appears to be based on the belief that Senate Bill No. 3420 was reprinted or set forth in Senate Report No. 792, 73d Cong., 2d Sess. (1934). In fact, Senate Report No. 792 did not set forth the text of Senate Bill No. 3420, but simply contains a summary of the bill by sections. The version of Section 16(b) set forth in Senate Bill No. 3420 itself does contain the preamble *and* the 10% beneficial owner exemption, both in the precise language of Section 16(b) as finally enacted. It follows, we believe, that the distinction made in the brief *amicus curiae* between manipulative ability and mere informational access, a distinction based on this erroneous reading of Senate Bill No. 3420, is without foundation.

2. The brief *amicus curiae* argues that Section 16(b) is not directed toward the possibility of abuse of inside information acquired after the purchase but before the sale, because the measure of liability imposed by Section 16(b) may not in such an instance correspond to the measure of gain derived from use of such inside information. The brief *amicus curiae* suggests that Section 16(b) should apply only to those 10% beneficial owners who can be proved to have exercised control over the issuer. Both questions are discussed, and, we submit, sufficiently answered, in Judge Learned Hand's analysis in *Gratz v. Claughton*, 187 F.2d 46, 50-52 (2d Cir.), *cert. denied*, 341 U.S. 920 (1951), the first reported decision of a United States Court of Appeals involving a 10% beneficial owner.

III.

In the event that the Court should decide on its own motion to consider the question of the applicability of Section 16(b) to the purchase by which a person becomes a 10% beneficial owner, petitioner Reliance would appre-

ciate the opportunity to submit a brief in support of that portion of the decision of the Eighth Circuit.

Respectfully submitted,

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